82-1163

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

S.E.A. TOWING CO., INC.,
Plaintiff-Petitioners

VERSUS

GREAT ATLANTIC INSURANCE COMPANY,
Defendant-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Petitioner has been denied due process of law and his day in court by the application of a prescription period established by a contract to which Petitioner was not a party.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

CORPORATE PARTY'S AFFILIATES

S.E.A. Towing Corporation, Inc. has no known corporate affiliates or other subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, S.E.A. Towing Co., Inc. respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the 5th Circuit entered October 12, 1982.

OPINIONS BELOW

The Opinion and Judgment of the Fifth Circuit Court of Appeals against Petitioners appears at Appendix B to this Petition. The Opinion and Judgment of the District Court appears at Appendix C.

JURISDICTION

The judgment of the Court below (Appendix A, infra. p. 8) was entered on October 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The 5th Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

On March 4, 1979, the M/V MARK DAVID, owned by Petitioner, S.E.A. Towing Co., Inc., sank in Morgan City, Louisiana. At the time, the vessel was chartered to R. J. Menard, who was obliged to maintain insurance for hull loss to the MARK DAVID. Insurance was thus provided by Great Atlantic Insurance Company. S.E.A. did not negotiate, seek, nor contract for this policy of insurance. The insurance contract was perfected between Menard and Great Atlantic.

On May 3, 1979, the charterer's representative forwarded a proof of loss claim requesting payment under the policy. Great Atlantic refused to pay. The charterer (Menard) then abandoned its claim.

On November 13, 1980, twenty months after the sinking, S.E.A. filed suit to recover under the policy for the loss.

The case was removed by the defendant to Federal Court on the basis of diversity jurisdiction. Great Atlantic then moved for summary judgment on grounds that the action was barred by a policy provision requiring that any suit to recover under the policy be commenced within one year after the date of the physical loss. The usual prescriptive period for such actions is ten (10) years (See La.CC 3544), although under limited circumstances, Louisiana law allows parties to contractually limit this time period. (See LSA-R.S. 22:629) However, S.E.A. was not a party to this contract, and never received a certificate of insurance setting forth the terms of this time limitation as required by LSA-R.S. 22:215(3)(g). The District Court granted Great Atlantic's motion for summary judgment and dismissed the complaint. The Fifth Circuit Court of Appeals affirmed this decision.

Both the District Court and the Fifth Circuit Court of Appeals applied Louisiana law to the policy in question. Louisiana law was unclear on the particular point raised by the facts of this case, so the Federal courts attempted to apply Louisiana law as the Louisiana Supreme Court would apply the law in similar circumstances. However, the interpretation imposed by the Federal courts upon the facts of this case violate the U.S. Constitution, specifically the due process clause of the Fifth Amendment. Certiorari is sought to review the unconstitutionality of this ruling.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's application of an improper prescriptive period has denied Petitioner his day in court, and has thus denied Petitioner due process of law. The Fifth Circuit Court of Appeals has applied a

prescriptive period which is in derogation of Louisiana statutory law; the prescriptive period in question was established in a contract to which Petitioner, S.E.A. Towing, was not a party. At no time was Petitioner made aware of this unusual time limitation. Great Atlantic did not provide Petitioner with a copy of the insurance policy as required by LSA-R.S. 22:215(3)(g), settled Louisiana jurisprudence, (see Lombard v. Manchester Life Insurance Co., La. 4th Cir. No. 12147, 1981), and due process. Petitioner has thus been barred from presenting his case in court by a prescriptive period in derogation of Louisiana statutory law established by a contract to which Petitioner was not a party. A contractual provision providing for a limited time period for filing suit can only be applicable to the parties negotiating the contract, and cannot limit a third party's (in this case Petitioner's) access to a court

for a disposition of its claim. Further, Petitioner was not given fair notice of this unusual time limitation, as required by Louisiana law and due process. Petitioner has thus been denied due process of law.

CONCLUSION

The decisions below are palpably erroneous. The lower courts have misapplied Louisiana law so as to violate the requirements of due process, thus causing substantial injustice. The Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted:

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Louisiana Civil Code Article 3544:

> "In general, all personal actions, except those before enumerated, are prescribed by ten years.:

Louisiana Revised Statutes R.S. 22:215(3)(g):

> "(g) An individual application shall not be required from a person covered under such a blanket policy. The insurer shall furnish to the policy holder for delivery to the insured a certificate of insurance which shall disclose the benefits, limitation, exclusions and reductions contained in the policy and the provisions relating to notice of claim, proof of loss, time of payment of claim and any other relevant information, including the name and address of the insurer."

Louisiana Revised Statutes R.S. 22:629:

"A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement:

* * *

"(3) Limiting right of action against the insurer to a period of less than one year from the time when the cause of action accrues in connection with all insurances unless otherwise specifically provided in this Code.:

APPENDIX B

Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, GEE and REAVLEY, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

On March 4, 1979, the M/V MARK DAVID, owned by the plaintiff, S.E.A. Towing Company, Inc. (S.E.A.), sank like a piece of the rock at her moorings in Morgan City, Louisiana. At the time of the sinking, the vessel was under a demise charter to R. J. Menard. The terms of the charter obliged Menard to insure the MARK DAVID for hull loss. Both Menard and S.E.A. were named assureds under a hull insurance policy issued by Great Atlantic Insurance Company (Great Atlantic).

On May 3, 1979, the charterer's representative forwarded to the underwriter, Great Atlantic, a proof of loss claim requesting payment under the policy. The

defendant declined coverage under the policy. On November 13, 1980, twenty months after the sinking, S.E.A. filed suit to recover under the policy for the loss.

Great Atlantic moved for summary judgment on grounds that the action was barred by a policy provision requiring that any suit to recover under the policy be commenced within one year after the date of the physical loss. The District Court granted the motion and dismissed the complaint. We affirm.

We agree with the parties and the Court below that Louisiana state law should apply in interpreting the policy at issue here. See Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955); American Marine Corp. v. Citizen Casualty Co. of New York, 447 F.2d 1328 (5th Cir. 1971) and Port Arthur Towing Co. v. Mission Insurance Co., 623 F.2d 367 (5th Cir. 1980).

The policy prescribed a twelve-month period in which to bring suit which, if invalid, would be replaced by the shortest time permitted by the respective state law.[1]

1. [1] In case of loss, such loss to be paid in thirty days after satisfactory proof of loss and interest shall have been made and presented to this Company (the amount of any indebtedness due this Company from the assured or any other party interested in this policy being first deducted).

* * *

It is a condition of this policy that [2] no suit, action or proceeding for the recovery of any claim for physical loss of or damage to the vessel named herein shall be maintainable in any court of law or equity unless the same be commenced within twelve (12) months next after the calendar date of the happening of the physical loss or damage out of which the said claim arose. [3] Provided, however, that if by the laws of the state within which this policy is issued such limitation is invalid, then any such claim shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted, by the laws of such state, to be fixed herein. (Brackets inserted for ease of reference).

[1] Under Louisiana law, such limitation periods are valid and enforceable. See Suire v. Combined Insurance Co. of America, 290 So.2d 271 (La. 1974); Stroud v. Northwestern National Insurance Co., 360 So.2d 528 (La.App. 2d Cir. 1978); Joe E. Freund, Inc. v. Insurance Co. of North America, 261 F.Supp. 131 (W.D.La. 1966); aff'd 370 F.2d 924 (5th Cir. 1967). Such provisions are, however, subject to the limitations imposed by LSA-R.S. 22:629, which provides:

> A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement:
>
> * * *
>
> (3) Limiting right of action against the insurer to a period of less than one year from the time when the cause of action accrues in connection with all insurances unless otherwise specifically provided in this Code.

S.E.A., relying on the literal language of §629, contends that the limitation period

of Great Atlantic's policy (supra note 1) is null and void. On that basis, S.E.A. urges that the ten-year prescriptive period provided by La. Civ. Code Art. 3554 be applied sc that the suit, having been filed twenty months after the date of the sinking of the MARK DAVID, was timely. We reject this argument.

[2] The assureds rely on Grice v. Aetna Casualty & Surety Co., 353 So.2d 401 (La. App. 4th Cir. 1977) for the proposition that Great Atlantic's limitation period is invalid under §629. Grice, however, may be distinguished on two grounds. First, the policy in Grice provided that suit for loss could not be legally instituted and that payment for loss was not enforceable until at least 60 days after the loss. This provision, combined with a one-year limitation period similar to that appearing in the policy in question here, left a plaintiff with but ten months in which to file suit on

the loss. On that basis, the Court ruled that §629 had been violated. Although Great Atlantic's policy does in effect give the insurer 30 days after receipt of a satisfactory proof of loss to make payment (see clause [1], supra note 1), there is no restriction on the right of the assured to file suit as in Grice. On that basis, Grice is inapplicable.[2]

Grice can be distinguished on a second ground. Unlike the policy discussed in Grice, the policy in question here contains a savings clause (see clause [3], supra note 1) extending the limitation period to the minimum period required by the applicable state law in the event the provisions violated state law. This brings into play Stroud v. Northwestern National Insurance

2. Louette v. Security Industrial Insurance Co., 361 So.2d 1348 (La.App. 3d Cir. 1978), is even more restrictive, forbidding exclusion of the 60-day proof of loss period from the 12-month suit period.

Co., 360 So.2d at 529, in which the Court held that an identical savings clause overcame §629.

Because the policy involved in Stroud contains a savings clause but no initial waiting period, we agreed with the District Court that Stroud should control herein the application of §629 A(3). Under Stroud, the plaintiff here had at most one year and thirty days in which to file its suit. Because the District Court found that plaintiff missed the boat by failing to institute suit until twenty months after the date on which the MARK DAVID sank, its order granting defendant's motion for summary judgment was correct.[3]

3. With the sinking occurring March 4, 1979, proof of loss being filed on May 3, 1979, and coverage formally declined on October 23, 1979, the suit on November 13, 1980, was untimely without the necessity for considering the distinctions recognized in American Marine Corp. v. Citizens Casualty Co. of New York, 447 F.2d 1328 (5th Cir. 1971).

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

S.E.A. TOWING., INC.	CIVIL ACTION
VERSUS	NO: 801892
GREAT ATLANTIC INSURANCE COMPANY	SECTION "D"

JUDGMENT

For reasons assigned this date,

IT IS ORDERED, ADJUDGED AND DECREED that this action be and it is dismissed with prejudice.

Lafayette, Louisiana, this 2nd day of February, 1982.

/s/ W. EUGENE DAVIS
Judge, United States District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

S.E.A. TOWING CO., INC.	CIVIL ACTION
VERSUS	NO: 801892
GREAT ATLANTIC INSURANCE COMPANY	SECTION "D"

RULING ON MOTION

STATEMENT OF THE CASE

This suit seeks recovery under a hull insurance policy allegedly covering the sinking of the M/V MARK DAVID. Defendant, Great Atlantic Insurance Company, has moved for summary judgment asserting that the suit was not timely filed pursuant to the terms of the policy.

UNCONTESTED FACTS

1) On March 4, 1979, the M/V MARK DAVID sank at her moorings at Morgan City, Louisiana. At the time of the sinking, the

vessel which was owned by the plaintiff was under a demise charter to R. J. Menard. Both Menard and plaintiff were named assureds under a hull insurance policy issued by the defendant.

2) On May 3, 1979, Mr. R. Scott Ramsey, attorney for R. J. Menard, requested payment of the loss and in support of the request attached the folowing: a copy of preliminary report of marine surveyor, Wright Marine, a copy of statement of Larry C. Rebardi, boat captain, a copy of statement of Cecil Bond, deckhand, and a copy of a marine salvage agreement between R. J. Menard and Triple "C" Salvage Company, Inc.

3) On November 13, 1980, plaintiff filed suit in the 16th Judicial District Court, Parish of St. Mary, Louisiana, to recover under the policy for this loss.

DISCUSSION

Defendant moves to dismiss this action on the grounds that plaintiff instituted the suit more than 13 months after the underwriter received a proof of loss.

The policy provisions relied upon by the defendant are as follows:

> In case of loss, such loss to be paid in thirty days after satisfactory proof of loss and interest shall have been made and presented to this Company (the amount of any indebtedness due this Company from the assured or any other party interested in this policy being first deducted).
>
> It is a condition of this policy that no suit, action or proceeding for the recovery of any claim for physical loss of or damage to the vessel named herein shall be maintainable in any court of law or equity unless the same be commenced within twelve (12) months next after the calendar date of the happening of the physical loss or damage out of which the said claim arose. Provided, however, that if by the laws of the state within which this policy is issued such limitation is invalid, then any such claim shall be void unless such action, suit or proceeding be commenced within the shortest

limit of time permitted, by the laws of such state, to be fixed herein.

Louisiana recognizes such limitation periods in insurance policies as valid and enforceable. See Suire v. Combined Insurance Company of America, 290 So.2d 271 (La. 1974); Stroud v. Northwestern National Insurance Co., 360 So.2d 528 (2nd Cir. 1978); Joe E. Freund, Inc. v. Insurance Company of North America, 261 F. Supp. 131 (W.D. La. 1966); affirmed 370 F.2d 924 (5th Cir. 1967).

Both parties assume and the court agrees that state law should apply in interpreting the policy at hand. See Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310 (1955); American Marine Corp. v. Citizen Casualty Co. of New York, 447 F.2d 1328 (5th Cir. 1971) and Port Arthur Towing Co. v. Mission Insurance Co., 623 F.2d 367 (5th Cir. 1980).

After reviewing the Louisiana jurisprudence, I conclude that the Louisiana Supreme Court would follow the rule enunciated by the court of appeals in Stroud, supra.

In Stroud, the insured was prohibited from filing suit before 90 days had expired following the date of loss. The policy in Stroud also contained a provision similar to the clause in defendant's policy setting a limitation period of one year from the date of loss or the shortest period allowed by law. The court held that the insured had one year and 90 days from the date of loss to file suit. The court noted that the additional clause extending the limitation period to the minimum period required by applicable state law should be given effect and this additional phrase prevented the limitation period from running afoul of LSA-R.S. 22:629.

Plaintiff argues that Grice v. Aetna Casualty & Surety Co., 353 So.2d 401 (La.

App. 4th Cir. 1977) is controlling and the limitation period in defendant's policy is invalid due to LSA-R.S. 22:629. Grice is distinguishable from Stroud because the policy in Grice did not contain the saving clause which was present in Stroud. See Stroud, supra, at page 529.

Plaintiff's next contention is that Mr. Ramsey's letter was not a "satisfactory proof of loss" and thus the 30-day grace period, followed by the 12-month contract limitation period has not yet begun to run. Plaintiff also argues that Mr. Ramsey represented the charterer, Menard, and did not represent plaintiff.

The policy does not require each individual insured to submit a proof of loss. To interpret the policy as imposing such a requirement here is patently unreasonable since the charterer filed a proof of loss for the entire loss, including plaintiff's interest.

I conclude that Mr. Ramsey's May 3, 1979, letter and attachments were a satisfactory proof of loss.

CONCLUSION

Under Louisiana law, plaintiff had one year and 30 days after May 3, 1979, within which to file suit. Since suit was not filed until November 13, 1980, plaintiff's claim is time barred. The motion for summary judgment is therefore granted.

Lafayette, Louisiana, this 2nd day of February, 1982.

/s/ W. EUGENE DAVIS
Judge, United States District Court